



12-1-1978

How to Effectively Participate in the Adjudicatory and Legislative Functions of Texas Environmental Agencies.

W. Thomas Buckle

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Environmental Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

W. Thomas Buckle, *How to Effectively Participate in the Adjudicatory and Legislative Functions of Texas Environmental Agencies.*, 9 ST. MARY'S L.J. (1978).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol9/iss4/5>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

HOW TO EFFECTIVELY PARTICIPATE IN THE ADJUDICATORY AND LEGISLATIVE FUNCTIONS OF TEXAS ENVIRONMENTAL AGENCIES

W. THOMAS BUCKLE*

In the early 1970's, there was significant involvement by private citizens and representatives of public interest groups in the activities of the two major state environmental agencies—the Texas Water Quality Board and the Texas Air Control Board. While much of this public interest involvement was nontechnical and limited to general expressions of support for stringent controls on air and water contaminant emissions, it was nonetheless helpful to the State agencies in carrying out their legislative mandates to solve Texas' pollution problems. Ironically, while a number of state statutes enacted in the last five years have greatly facilitated the ability of the public to participate in agency actions and have vastly improved the public's power to ensure that agency actions are in furtherance of the legislative goal of cleaning up our pollution problems, public involvement has steadily declined. While many reasons have been advanced for the current lack of citizen involvement, this article is intended to put to rest only one reoccurring complaint—that citizens lack knowledge as to the existence and effective utilization of the laws enacted to enable them to meaningfully participate in the agency decisionmaking process.

Before proceeding with an analysis of the laws protecting citizen participation, one other reason for low citizen involvement should be briefly discussed. Many citizens complain, and critics of citizen participation in environmental matters concur, that the average citizen quickly gets lost in the technical and scientific issues involved in environmental control and either resorts to general policy statements or loses interest and never again becomes involved in environmental issues. Frankly, this is a very real problem. Many of the issues in environmental control are extremely technical, scientifically complex and require the type of specialized training which most citizens do not have. Faced with this situation, if a citizen or citizens group resorts to general policy statements, their testimony will be politely received by the agency but will either be ignored or

* B.A., Rice University; J.D., University of Texas; Assistant Attorney General of Texas, Environmental Protection Division.

answered with nice sounding but empty platitudes. Hopefully this article will clearly set forth the manner in which existing laws can be used to guarantee the availability of participation. For public interest participation to be substantively effective, representatives of the public interest will have to devote both their time and resources to the issue of what to say as well as to the endeavor of obtaining relevant facts from and the opportunity to articulate their position to the agency.

The regulatory activities of the agencies with significant environmental functions can be divided into two broad categories: (1) general rulemaking—proposing and promulgating procedural and substantive rules of general applicability; and (2) regulatory actions involving individual facilities—including granting permits or licenses and enforcing compliance with general applicability rules and regulations. While some of the statutory and regulatory provisions to be discussed apply to both types of regulatory activities, others apply only to one type; therefore, this article will indicate which regulatory activities are governed by each of the statutory or regulatory provisions.

INITIATING AGENCY ACTION

Rulemaking

The first fact a representative of the public interest will have to accept if he or she is to be effective in agency decisionmaking is that many state agencies do not quickly or effectively address problems within their respective jurisdictional areas. Consequently there will be times when a public interest representative will have to prod the agency into taking the necessary action required. With the adoption of the Administrative Procedure and Texas Register Act¹ (APTRA), Texans have for the first time been given the legal right to have an agency squarely and openly address a problem by making it react to a proposed regulation. Section 11 of the Act provides that any interested person "may petition an agency requesting the adoption of a rule."² Within sixty days after the submission of such a petition, the agency must either "deny the petition in writing, stating its reasons for the denial, or shall initiate rulemaking proceedings in accordance with section 5 of this Act."³ Section 11 also instructs each of the agencies to adopt rules governing the form and

1. TEX. REV. CIV. STAT. ANN. art. 6252-13a, §§ 1-23 (Vernon Supp. 1978).

2. *Id.* § 11.

3. *Id.* § 11.

procedural framework for the petition's submission, consideration and disposition.⁴

For instance, under rule 52 of the Texas Air Control Board Procedural Rules, a petition for a new rule is to be filed with the agency's Executive Director.⁵ The petition must provide a text of "the proposed rule in narrative form with sufficient particularity to inform the Board and any interested party of the facts upon which the applicant relies."⁶ Within fifteen days of filing such a petition, the Executive Director is to give petitioner written notification of any agency action on the petition.⁷ If the Director does not believe rule-making should be initiated on the proposed rule, he is to furnish a copy of the petition and reasons for denial to all members of the Board at the time he notifies the petitioner of his decision.⁸ The Director's decision becomes final unless, within forty-five days after date of denial, the Board takes affirmative action on the denied petition.⁹ Should the proposed rule be accepted, rulemaking procedures must then be initiated by the Director no later than sixty days after submission of the petition.¹⁰

Under the new water agency,¹¹ rulemaking functions are vested primarily in the Texas Water Development Board,¹² although the Texas Water Commission also has several functions which involve rulemaking.¹³ Unlike the procedure before the Texas Air Control Board, the petition for rulemaking is filed directly with the Water Commission or Board rather than the Executive Director.¹⁴ In fact, under the water agency's procedure, the staff has no formal review or decision-making functions with regard to a petition for rulemaking.

A petition to the water agency requires a more formal legal format than a petition to the air agency. The water agency petition must

4. *Id.* § 11.

5. Tex. Air Control Bd., Rule 131.02.03.002, 1 Tex. Reg. 1167-68 (1976).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. The Texas Department of Water Resources was created by the 1977 Texas Legislature consolidating the three major water agencies into one state agency. This act combined the Texas Water Development Board, the Texas Water Rights Commission and the Texas Water Quality Board. TEX. WATER CODE ANN. § 5.001 (Vernon Supp. 1978).

12. *Id.* § 5.013.

13. *Id.* § 5.262.

14. Compare Tex. Air Control Bd., Rule 131.02.03.002, 1 Tex. Reg. 1167-68 (1976) with Tex. Water Dev. Bd., Rule 156.01.01.009, 3 Tex. Reg. 596 (1978).

include a statement of the statutory or other authority under which the rule is to be promulgated, an allegation of injury or inequity which could result from the failure to adopt the rule, a brief explanation of the proposed rule; and the text of the proposed rule in a manner to indicate the words to be added or deleted from the current text.¹⁵

The right to petition an agency to adopt proposed rules is an extremely valuable, though rarely used, way to at least create public discussion on issues of state-wide or regional importance. For example, under the 1977 amendments to the Federal Clean Air Act, there is an option given to the states to adopt the more stringent California emission standards on automobiles in lieu of the federal standards.¹⁶ Through a petition for a proposed rule, a public interest representative could at least force the Texas Air Control Board to state why it would not adopt the California standards, and could very likely get the Texas Air Control Board to schedule the issue for public hearings. There is probably no more effective way for a public interest representative to have a direct impact on the future direction of an agency on broad issues than this right to propose rules and regulations.

Compliance Action

Frequently it is necessary for a private citizen or citizens group to require the agency to enforce compliance with its administrative regulations, permits or licenses, or with the statutory provisions of the environmental acts. Again, the most effective method for obtaining relief is to force the agency to publicly address and make a decision on the issue. While APTRA does provide that the agency must conduct public hearings in "contested cases," the definition of "contested case" under the Act severely limits this right to a hearing.¹⁷ A "contested case" is defined in the Act as a "proceeding, including but not restricted to ratemaking and licensing, in which the legal rights, duties, or privileges of a party are to be determined by an agency *after an opportunity for adjudicative hearing.*"¹⁸ The Administrative Procedure Act, therefore, does not grant a person a right to a hearing, it only enunciates the rules that are to govern

15. Tex. Water Dev. Bd., Rule 156.01.01.009, 3 Tex. Reg. 596 (1978).

16. See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 207, 91 Stat. 755 (1977) (to be codified in 42 U.S.C. § 7541).

17. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 13(a) (Vernon Supp. 1978).

18. *Id.* § 3(2) (emphasis added).

hearings that are otherwise held under other statutory or regulatory authorization. Consequently, the right to a hearing must be found in the environmental acts themselves or in the regulations of the various agencies.

Under the Texas Clean Air Act, hearings are only required prior to adoption of rules and regulations¹⁹ or when the Executive Director has recommended the denial of a variance petition.²⁰ Through the adoption of procedural rules, however, the Texas Air Control Board has expanded the types of situations where a hearing is required. By administrative rule, hearings will be held on all variance petitions regardless of the Executive Director's recommendation,²¹ and on cases which can result in the entry of an administrative enforcement order under sections 3.12, 3.13 and 3.20(b) of the Texas Clean Air Act.²²

Under the Texas Water Quality Act, however, required hearings are much more numerous and mandated in all cases involving the establishment of water quality standards by the Board;²³ the issuance, amendment, or revocation of a permit by the Commission;²⁴ the Board approval of a water quality management plan for geographical areas of the state;²⁵ orders regulating the Edwards Aquifer by the Commission;²⁶ and the designation of area-wide waste collection, treatment and disposal systems by the Board.²⁷

Even if a public hearing on the particular issue of interest to a public representative is not required by the relevant statute, provisions of the Texas Clean Air Act²⁸ and the Texas Water Quality Act²⁹ give the Air Board and Water Commission broad powers to call and hold discretionary public hearings. The most important matter likely to be subject to a discretionary public hearing is an administrative order to enforce compliance with regulations or statutory provisions.

19. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 3.09(b) (Vernon 1976).

20. *Id.* § 3.22.

21. Tex. Air Control Bd., Rule 131.02.02.001(1), 1 Tex. Reg. 1166-67 (1976).

22. Tex. Air Control Bd., Rule 131.02.02.001(2), 1 Tex. Reg. 1167 (1976). One major flaw in the Air Control Board's list of required hearings is the absence of any required hearing on permit matters. By Rule 131.02.02.001(3), 1 Tex. Reg. 1167 (1976), all permit hearings are made discretionary with the executive director of the Board.

23. TEX. WATER CODE ANN. § 26.024 (Vernon 1978).

24. *Id.* § 26.028-.029.

25. *Id.* § 26.037.

26. *Id.* § 26.046.

27. *Id.* § 26.082-.083.

28. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 3.15 (Vernon 1976).

29. TEX. WATER CODE ANN. § 26.020 (Vernon Supp. 1978).

While the decision to call a compliance hearing remains a discretionary matter with the Executive Director of the Texas Air Control Board,³⁰ the Board has adopted procedural rules which allow a person to petition the Executive Director for such a hearing.³¹ The rules further provide that the Executive Director's decision on whether to call the public hearing must be made and notification of the decision be given to the petitioner within thirty days after receipt of the petition.³² Most importantly, the decision of the Executive Director to deny the request for a hearing is appealable to the full Board within thirty days after notification of the decision.³³ Similar procedural rules will not be adopted by the Texas Water Commission since the Commission itself makes the decision on whether to hold discretionary public hearings.³⁴

It becomes apparent that an agency's discretionary prerogative to grant or deny hearings coupled with state statutes which fail to provide citizen suit provisions effectively precludes the ability of the public interest representative to force the agency to discipline a party not in compliance with its permits or regulations.³⁵ However, under the 1977 version of the Texas Water Code, an intriguing provision has been added. House Bill No. 1981-107, which created the Texas Department of Water Resources by merging the former Texas Water Quality Board, Texas Water Rights Commission, and Texas Water Development Board,³⁶ provides a remedy for nonaction by the entities created under the Act. The provision reads as follows:

30. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 3.20(b) (Vernon 1976) provides that these compliance decisions are also discretionary with the Board in addition to the executive director.

31. Tex. Air Control Bd., Rule 131.02.04.002, 1 Tex. Reg. 1168 (1976).

32. *Id.* at .003, 1 Tex. Reg. 1168.

33. *Id.*

34. TEX. WATER CODE ANN. § 26.020 (Vernon Supp. 1978).

35. It should be pointed out that there are citizen suit provisions under both the Federal Clean Air Act and the Federal Water Quality Act. See Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)-(h) (Supp. V 1975); Federal Clean Air Act, 42 U.S.C. § 1857h-2 (1970). With regard to violations of the Air Control Regulations, there may be an identical Federal regulation by way of the state's implementation plan which is submitted to the federal government for approval. See 42 U.S.C. § 1857 C-5 (1970) as amended by 42 U.S.C. 1857 C-5 (Supp. V 1975) (submission of state implementation plans). In this event, while a citizen could not initiate legal action in the state court to enforce compliance with a state regulation, he may be able to achieve the same result by citizen's suit in federal court for compliance with any provisions of a federally approved state implementation plan. See 42 U.S.C. § 1857h-2(a)(1) (1970). The state and federal government each run their own discharge permit system for water quality violations. Most permits are identical and a suit in federal court to enforce compliance with the federal permit would again likely achieve the same result as the state suit to enforce compliance with the state permit. See 33 U.S.C. § 1342 (Supp. V 1975).

36. TEX. WATER CODE ANN., §§ 5.001-30.101 (Vernon Supp. 1978).

A person affected by the failure of the executive director, commission, or board to act in a reasonable time on an application to appropriate water or to perform any other duty with reasonable promptness may file a petition to compel the executive director, commission, or board to show cause why it should not be directed by the court to take immediate action.³⁷

Although this remedy is restricted to "duties" which the department, commission, or Executive Director have under the Act, it may provide a remedy to get the agency to act in appropriate fact situations, particularly since the term "duties" is not modified by "non-discretionary." There is no companion provision to section 5.352 in the Texas Clean Air Act.

NOTIFICATION OF PROPOSED AGENCY ACTION AND BECOMING A PARTY TO AGENCY PROCEEDINGS

Rulemaking

Notification of proposed agency action in rulemaking proceedings is governed both by the Administrative Procedure-Texas Register Act (APTRA) and the individual environmental acts. Under APTRA, the agency has to give at least thirty days notice of its intended action in the Texas Register.³⁸ The notice is effective when published and must include not only the text of the proposed rule but also a brief explanation of the rule, the statutory or other authority under which the rule is proposed, a request for comments on the proposed rule, and any other statement required by law.³⁹ Interestingly, the Act also requires that notice is to be mailed to all persons who made timely written requests of the agency for advance notice of its rulemaking proceedings.⁴⁰ In the Texas Water Quality Act and the Texas Clean Air Act, there are notice provisions requiring publication in newspapers in the geographical area impacted by the proposed action which are not required by APTRA.⁴¹ These statutory notice requirements must be complied with in addition to the provisions of APTRA.

While APTRA does not require that a public hearing be held prior to agency rulemaking action unless requested by a local government

37. *Id.* § 5.352 (emphasis added).

38. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5(a) (Vernon Supp. 1978).

39. *Id.* § 5(a) & (b).

40. *Id.* § 5(b).

41. TEX. WATER CODE ANN. § 26.022 (Vernon Supp. 1978); TEX. REV. CIV. STAT. ANN. art. 4477-5, § 3.09 (Vernon 1976).

or twenty-five persons, individually or as an association,⁴² the Texas Clean Air Act provides for hearings to be held prior to *any* rulemaking proceedings.⁴³ Because the authorizing statute's hearing requirements are stricter than those of APTRA, the Texas Air Control Board must provide hearings prior to any final rulemaking action. The Texas Water Code lacks these stricter provisions found in the Clean Air Act and simply provides that the Board's and Commission's rules are to be adopted in conformance with APTRA.⁴⁴

There is a provision in APTRA which allows the agency to dispense with or abbreviate the notice and any public hearing requirements by the adoption of an emergency rule where the agency determines there is an "imminent peril to the public health, safety, or welfare."⁴⁵ Such an emergency rule is good for only 120 days and can be renewed once for an additional 60 days.⁴⁶ It is still an open question whether this provision overrules other statutory notice and hearing requirements. The Texas Air Control Board, Texas Water Commission, and Texas Water Development Board have all apparently concluded that it does as each has adopted regulations which allow the respective agencies to adopt emergency regulations in conformance with APTRA.⁴⁷ Despite the fact that neither the Texas Clean Air Act nor the Texas Water Quality Act have provisions directly allowing the respective agencies to adopt emergency rules, it seems that the mandate in the Texas Water Code for the Board and Commission to adopt rules in conformance with the Texas Register Act would at least authorize such emergency rules for the water agency.

Any interested person can participate in a rulemaking hearing either through an oral or written presentation. In order to be allowed to present oral testimony at a hearing, most agencies merely require that one be physically present and express a desire to present oral testimony when he or she registers with the hearing officials.⁴⁸

42. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5(c) (Vernon Supp. 1978).

43. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 3.09(b) (Vernon 1976).

44. TEX. WATER CODE ANN. §§ 5.131(c), 5.262(b) (Vernon Supp. 1978).

45. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5(d) (Vernon Supp. 1978).

46. *Id.*

47. See Tex. Water Dev. Bd., Rule 156.01.01.010, 3 Tex. Reg. 596 (1978); Tex. Air Control Bd., Rule 131.02.03.001, 1 Tex. Reg. 1167 (1976).

48. It would be advisable for a person desiring to give written testimony to contact the agency in advance of the hearing at which the data is to be presented. Most agencies request multiple copies of any written testimony and also allow the submission of written testimony without a personal appearance at the hearing.

Compliance Action

Any compliance action undertaken against an individual or an industry by an environmental agency would be a "contested case" under APTRA's definition, provided there is a hearing prior to the agency action.⁴⁹ It does not matter whether the hearing is required by statute or regulation or is called at the discretion of the agency in order for the matter to be a "contested case."

Under APTRA the hearing on a "contested case" must be preceded by reasonable notice of not less than ten days⁵⁰ and is required to be sent to all "parties."⁵¹ The more extensive notice requirements of the Texas Water Quality Act⁵² and the Texas Clean Air Act⁵³ are also applicable and guarantee that the notice will be published in newspapers in the geographical area affected by the agency action as well as sent to the parties.

By procedural rule, the agencies have expanded on the question of who is a "party" to a "contested case" hearing. The Texas Air Control Board has provided that "the staff of the Texas Air Control Board and all persons named in the hearing notice are parties to the hearing."⁵⁴ In addition, the notice will set a time limit of not less than ten days from the date the notice was issued by the Board's Executive Director within which time any other interested person may apply in writing to the hearing examiner to be admitted as a party to the hearing.⁵⁵ The rule also provides that "the hearing examiner shall admit all interested persons who make timely application and shall notify in writing the persons admitted."⁵⁶ Under the rule, the designation of "party" is important in that only parties are permitted to present evidence and argument and to cross-examine witnesses.⁵⁷

The Texas Water Commission has a restricted definition of "party." Under its rule, "in order to be admitted as a party, a person must have a justiciable interest in the matter being considered."⁵⁸

49. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 3(2) (Vernon Supp. 1978).

50. *Id.* § 13(a).

51. *Id.* § 13(a) & (b). APTRA defines a party to a hearing as "each person or agency named or admitted as a party." *Id.* § 3(5).

52. TEX. WATER CODE ANN. § 26.022 (Vernon Supp. 1978).

53. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 3.17 (Vernon 1976).

54. Tex. Air Control Bd., Rule 131.02.05.003, 1 Tex. Reg. 1169 (1976).

55. *Id.*

56. *Id.*

57. *Id.*

58. Tex. Water Comm'n., Rule 155.04.00.001, 3 Tex. Reg. 526 (1978).

Parties under the Water Commission's rules are "designated on the first day of the hearing or at such time as may be designated by the Commission."⁵⁹ While the Water Commission has restricted who may be a "party," it has provided the Commission with discretion to permit persons who are not parties to make or file statements.⁶⁰

The advantage of the Air Board's procedures is that evidence presented by a party is properly a part of the record and can be used as a basis for the agency's decision. The disadvantage is that persons who would like to make statements at the hearing but do not want to get involved in all the pre-hearing procedures are foreclosed from participating. On the other hand, while the Water Commission would probably allow anyone to make a statement, the right to make the statement is somewhat meaningless in terms of future litigation because the statement, not being part of the record, cannot be used by the agency in deciding the matter before it. Therefore, from a legal standpoint, the public interest representative is in a much better position under the Air Board's procedures. From a public relations standpoint, the Water Commission's procedures are probably better received by the public.

PREPARING FOR PARTICIPATION IN AGENCY ACTION

There is quite a difference in the amount of time and cost required for a public interest representative to participate in a rulemaking hearing and to participate in a contested case hearing. In rulemaking hearings, there are no parties, no formal rules of evidence, no cross-examination of witnesses, nor any of the other aspects of a formal administrative hearing. Rulemaking hearings are solely designed to allow interested persons to articulate their position to the agency through either written or oral presentations.⁶¹

In order for the presentation to be effective, however, it is advisable for the participant to prepare adequately prior to the hearing. Through the provisions of APTRA, a person will have access to the actual text of the proposed rule, a brief explanation of what it is intended to do, what its anticipated cost to the governmental agencies will be, and the statutory authority under which the agency is acting in promulgating the regulation.⁶² However, neither the Texas

59. *Id.*

60. *Id.*

61. Tex. Water Dev. Bd., Rule 156.01.15.001-.007, 3 Tex. Reg. 596 (1978); Tex. Air Control Bd., Rule 131.02.02.001(4), 1 Tex. Reg. 1167 (1976).

62. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5 (Vernon Supp. 1978).

Register nor the newspaper notice required by the environmental statutes will provide the person with the factual information guiding the agency in proposing the regulation.

Under the Texas Public Records Act,⁶³ most information in the custody of governmental agencies and bodies is open to the public. Section 3 of the Act provides:

All information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body, with the following exceptions only⁶⁴

The Act then sets out sixteen very limited exceptions which restrict the public's access to material covered by privileges and legitimate needs for privacy.⁶⁵

If a person desires to examine public information in the files of an agency, he should first contact that agency.⁶⁶ Although the Act does not require a written application, if inspection is refused, a written application to inspect the documents should be made in order to invoke the Agency's mandatory response under the Act. The Act requires that if a governmental body receives a written request for information which it considers to be within one of the exceptions and there has been no previous determination that it falls within one of the exceptions, the governmental body must within a reasonable time, but no later than ten days after receiving the written application for information, request a decision from the Attorney General to determine whether the information is within that exception.⁶⁷

The Act also provides that State officers should make provisions to ensure that the public records can be copied and provided to the public.⁶⁸ While there are provisions for the Board of Control to establish the cost of copies, each agency can establish the amount it will charge for copying its documents.⁶⁹

63. TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 1-15 (Vernon Supp. 1978).

64. *Id.* § 3(a).

65. *Id.* § 3(a)(1)-(16).

66. *Id.* §§ 4, 5.

67. *Id.* § 7(a). Attorney General's opinions under the Public Records Act are issued and numbered separately from normal Attorney General's opinions. Individual copies of such opinions are available from the Attorney General's office and many legal libraries maintain bound volumes of such opinions.

68. *Id.* § 5.

69. *Id.* § 9. Currently both the air and water agencies charge fifty-five cents for the first page and fifteen cents for each additional page plus tax and postage.

Both the Texas Clean Air Act and the Water Code have provisions making all information, documents, and data filed with the agency open to the public.⁷⁰ In light of two recent Attorney General opinions, it appears that those provisions are even broader than the Public Records Act.⁷¹ The only exception under the environmental statutes is for information which is indeed "confidential" as that term is defined in the statutes and which has been so labeled when filed with the agency.⁷² Utilization of the open records provisions should never be overlooked in preparing for a rulemaking hearing.

While the Public Records Act and the environmental statutes' provisions on public information should also be utilized in "contested cases," preparation for participation in a "contested case" hearing can and often does require a substantially greater effort. In fact, while neither the Air Board nor the Water Commission requires that a person not representing himself be represented by an attorney,⁷³ experience has indicated that laymen quickly get lost in administrative proceedings which, since the effective date of APTRA, often parallel court proceedings. Initially, there was a substantial outcry by public interest representatives against this quasi-judicial adversary atmosphere. As will be apparent from the section of this article on *Judicial Review of Agency Decisions*, public interest representatives should instead welcome the formality which has attended the hearings under APTRA and demand that contested case hearings continue to be conducted in a legalistically correct manner.⁷⁴

It is imperative for public interest representatives to realize that the record made at the administrative hearing is in all probability the only chance they will get to present their side of the controversy. Perhaps the legislature did not intend for APTRA to make adminis-

70. TEX. WATER CODE ANN. § 5.053 (Vernon Supp. 1978); TEX. REV. CIV. STAT. ANN. art. 4477-5, § 2.13 (Vernon 1976).

71. Compare TEX. ATT'Y GEN. OP. NO. H-276 (1974) with TEX. ATT'Y GEN. ORD-176 (1977). In the former opinion it was held that the names of persons complaining about specific air pollution problems were available to the public under section 2.13 of the Texas Clean Air Act while in the latter opinion, the Attorney General held that the name of individuals informing on possible child care standards violations are excepted from disclosures under section 3(2)(10) of the Open Records Act. *Id.*

72. See TEX. ATT'Y GEN. OP. NO. H-836 (1976) which analyzed section 1.07 of the Texas Clean Air Act which defines "confidential information" submitted to the Texas Air Control Board. See TEX. REV. CIV. STAT. ANN. art. 4477-5, §§ 2.13 & 1.07 (Vernon 1976).

73. Tex. Water Comm'n, Rule 155.02.00.040, 3 Tex. Reg. 524 (1978); Tex. Air Control Bd., Rule 131.02.05.005, 1 Tex. Reg. 1169 (1976).

74. Elaboration on the benefits of a formal hearing procedure will be discussed in the section on judicial review.

trative proceedings such legally formal events, but the courts have clearly indicated they intend for the administrative agencies to adhere to the letter of APTRA and that they are not going to substitute their judgment for that of the agency unless there is practically no evidence in the record to support the agency decision.⁷⁵

The procedural rules of both the Texas Water Commission and the Texas Air Control Board allow the hearing examiner substantial responsibility and discretion in the conduct of a contested case hearing.⁷⁶ The first formal step in the hearing process following the publication of the notice of hearing is a prehearing conference. Although the Air Board's Procedural Rules require a prehearing conference,⁷⁷ the Water Commission's rules allow a prehearing conference only at the discretion of the Commission.⁷⁸ Such conferences are designed by rule to formulate the issues, exchange written testimony, establish the number and names of witnesses, obtain stipulations and admissions, establish the procedure to be followed at the hearing, and consider any other matters that may expedite the hearing or aid in the disposition of the matter.⁷⁹ Both agencies' sets of rules also require that the actions taken at the prehearing conference be reduced to writing and become a part of the record.⁸⁰

In addition to prehearing discovery available through the utilization of the provisions of the Public Records Act,⁸¹ APTRA establishes the availability of prehearing depositions and subpoenas.⁸² Both agencies have promulgated rules providing the procedures by which a person can invoke these discovery provisions within its agency.⁸³

With regard to the evidence to be presented at a contested case hearing, APTRA specifies that irrelevant, immaterial, or unduly repetitious evidence is to be excluded and that the rules of evidence

75. See *Imperial Am. Resources Fund, Inc. v. Railroad Comm'n*, 557 S.W.2d 280 (Tex. 1977). But see *Lewis v. Metropolitan Sav. & Loan Ass'n*, 550 S.W.2d 11 (Tex. 1977).

76. Tex. Water Comm'n, Rule 155.01.00.030, 3 Tex. Reg. 523 (1978); Tex. Air Control Bd., Rule 131.02.05.005, 1 Tex. Reg. 1170 (1976).

77. Tex. Air Control Bd., Rule 131.02.05.006, 1 Tex. Reg. 1169 (1976).

78. Tex. Water Comm'n, Rule 155.03.00.030, 3 Tex. Reg. 525-26 (1978).

79. Tex. Water Comm'n, Rule 155.03.00.030, 3 Tex. Reg. 525-26 (1978); Tex. Air Control Bd., Rule 131.02.05.006(1)-(4), 1 Tex. Reg. 1169-70 (1976).

80. Tex. Water Comm'n, Rule 155.03.00.035, 3 Tex. Reg. 526 (1978); Tex. Air Control Bd., Rule 131.02.05.006(5), 1 Tex. Reg. 1170 (1976).

81. TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 1-15 (Vernon Supp. 1976).

82. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 14 (Vernon Supp. 1978).

83. Tex. Water Comm'n, Rule 155.02.00.080, 3 Tex. Reg. 525 (1978); Tex. Air Control Bd., Rule 131.02.05.005, 1 Tex. Reg. 1169 (1976).

as applied in non-jury civil cases in Texas district courts are to be followed.⁸⁴ It also provides that "[w]hen necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."⁸⁵ An additional provision of APTRA allows the hearing examiner to take official notice not only of all facts judicially cognizable, but also of "generally recognized facts within the area of the agency's specialized knowledge."⁸⁶ This provision has already resulted in several appellate decisions⁸⁷ and considering the tendency of agencies to avoid complicated admissibility issues, it is the author's opinion, there will be many more cases involving this section. The proper application of this provision is extremely helpful in avoiding burdensome admissibility problems.⁸⁸

The procedural rules of both agencies have incorporated verbatim this section of APTRA dealing with admissibility of evidence.⁸⁹ The procedural rules on the order of presentation of evidence, cross-examination, and oral argument are roughly equivalent to similar provisions of the Texas Rules of Civil Procedure.⁹⁰

GUARANTEEING AGENCY ARTICULATION OF THE BASIS FOR ITS ACTION

There is a substantial benefit to be derived from having any agency articulate the basis for its decisions. It is especially important in the case of the environmental agencies because the boards governing these agencies are composed of unpaid, politically appointed individuals who often do not have any technical expertise in the area they are regulating.⁹¹ The requirement that these indi-

84. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 14(a) (Vernon Supp. 1978).

85. *Id.* § 14(a).

86. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 14(q) (Vernon Supp. 1978).

87. See *City Sav. Ass'n v. Security Sav. & Loan Ass'n*, 21 Tex. Sup. Ct. J. 155 (Jan. 21, 1978); *Employees Retirement Sys. v. Hill*, 557 S.W.2d 819, 823 (Tex. Civ. App.—Waco 1977, no writ).

88. A prime example of the problems which can arise from the admission of evidence in an administrative hearing is illustrated by Justice McGee's dissent in *Lewis v. Metropolitan Sav. & Loan Ass'n*, 550 S.W.2d 11, 16-17 (Tex. 1977) (dissenting opinion).

89. Tex. Water Comm'n, Rule 155.04.00.055, 3 Tex. Reg. 527 (1978); Tex. Air Control Bd., Rule 131.02.05.009, 1 Tex. Reg. 1170 (1976).

90. Compare TEX. R. CIV. P. 265 with Tex. Water Comm'n, Rule 155.04.00.050-.065, 3 Tex. Reg. 527 (1978) and Tex. Air Control Bd., Rule 131.02.05.009, 1 Tex. Reg. 1170 (1976).

91. Although the board members receive no salary, they are entitled to \$25.00 for each day they are engaged in agency business plus reimbursement for travel and necessary expen-

viduals articulate in non-technical language the reasons which formed the basis for their decision is often as much of an assistance to their own understanding of the agency processes as it is to the public's understanding of the reasoning. It should be pointed out, however, that the three members of the Water Commission are full-time, paid officials who generally have acquired a specialized knowledge in the areas of their responsibility.⁹²

Rulemaking

Once a rule has been adopted, APTRA requires that the agency issue a concise statement of the principal reasons for and against the rule's adoption including its reasons for overruling the considerations urged in support of another position.⁹³ This duty only arises when the board's reasons are requested by an interested person prior to adoption or within thirty days thereafter.⁹⁴ While not legally relevant in any judicial review of the agency action, this statement is of obvious importance in making the agency justify its action to the public. It should also assist the public interest representative in deciding whether to judicially appeal the agency's adverse decision.

Compliance Action

In a contested case, APTRA requires as follows:

If in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, may not be made until a proposal for decision is served on the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs to the officials who are to render the decision.⁹⁵

The Act further provides that this proposal for decision must contain not only a statement of the reasons for the proposed decision but also each finding of fact and conclusion of law necessary to

ses. See TEX. WATER CODE ANN. § 5.097 (Vernon Supp. 1978); TEX. REV. CIV. STAT. ANN. art. 4477-5, § 2.05 (Vernon 1976). Some Air Board members may have substantial technical expertise because five of its nine members must be chosen from specifically related professions. See TEX. REV. CIV. STAT. ANN. art. 4477-5, § 2.02 (Vernon 1976).

92. See TEX. WATER CODE ANN. § 5.225 (Vernon Supp. 1978) (Water Commission directors serve on full time basis).

93. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5(c) (Vernon Supp. 1978).

94. *Id.* § 5(c).

95. *Id.* § 15.

support the proposed decision, prepared either by the person who conducted the hearing or by a person who has read the record.⁹⁶

It is extremely important for the public interest representative to take this proposal for decision seriously, and if adverse to his position, to file exceptions and alternative findings of fact. Although the Act provides that this requirement for proposal for decision can be waived by stipulation of the parties,⁹⁷ it would be foolish to agree to such a waiver in practically all cases.⁹⁸ Waiver of the proposal for decision would not only remove an opportunity to have a succinct, organized, written presentation made to the board, but would also add to their already confused discussions resulting from lack of technical expertise which often end in the rejection of staff recommendations in even the best presented cases. Elimination of the written proposal, exceptions and alternative findings would only increase the likelihood of unintelligible and inconsistent decision making.

The environmental agencies have promulgated procedural rules establishing time periods for filing exceptions and alternative findings, and for rendering final decisions in contested cases. The Texas Air Control Board requires any party to file exceptions to the proposed decision with the Board and the hearing examiner within twenty days after the proposed decision is filed with the Board.⁹⁹ The rule further provides that if a party desires to propose any alternative findings, they must be submitted at the time the exceptions are filed.¹⁰⁰ The Air Board also permits parties to file briefs in conjunction with the exceptions and alternative findings.¹⁰¹ On the other hand, the Texas Water Commission requires that exceptions or proposed alternative findings be filed by a party within ten days following the issuance of the proposed Board decision and that any reply to such exceptions or proposed alternate findings be filed within twenty days after the date of issuance of the proposal for decision.¹⁰²

96. *Id.* § 15.

97. *Id.* § 15.

98. It may not only be foolish, there is a possibility it could be legally harmful. In *Southwest Livestock & Trucking Co. v. Texas Air Control Bd.*, No. 257,739 (Dist. Ct. of Travis County, 53rd Judicial Dist. of Texas, March 21, 1978), Judge Hume Cofer held that in addition to failing to include certain points in Plaintiff's Motion for Rehearing, its failure to except to the Hearing Examiner's proposal for decision or to file its own proposed findings, resulted in Plaintiff's waiving its right to object to the agency's error.

99. *Tex. Air Control Bd.*, Rule 131.02.05.014, 1 *Tex. Reg.* 1170-71 (1976).

100. *Id.*

101. *Id.*

102. *Tex. Water Comm'n.*, Rule 155.05.00.025, 3 *Tex. Reg.* 528 (1978). *See also id.* Rule

With regard to the meeting at which the report of the hearing examiner is considered, the Texas Air Control Board rules require that there be at least ten days notice to all parties of the time and place of the Board meeting.¹⁰³ The Water Commission rules allow the Commission to make a final decision at any time after the expiration of twenty days following service of the examiner's proposal for decision, without notifying the parties as to when the decision will be made.¹⁰⁴ In conformance with APTRA,¹⁰⁵ both agencies have procedural rules stating that the final decision will customarily be rendered within sixty days after the hearing record has closed. Both note, however, that in a contested case heard by an examiner, a longer period of time may be necessary before the Board or Commission can finally decide the case.¹⁰⁶

Once the Board or Commission renders a final decision adverse to any party, APTRA requires that it be in writing and include findings of fact and conclusions of law, separately stated.¹⁰⁷ To insure that the agency clearly articulates the basis for its decision, the Act requires that where the findings of fact are set forth in statutory language, they "must be accompanied by a concise and explicit statement of the underlying facts supporting the findings."¹⁰⁸ Moreover, if a party submitted alternative findings of fact, the decision must also include a ruling on each factual finding proposed.¹⁰⁹

Following the entry of a final decision, APTRA requires a motion for rehearing as a prerequisite to judicial review of the agency action, unless the action is clearly denoted as an emergency order.¹¹⁰ The motion for rehearing must be filed within fifteen days after the final decision has been rendered and replies must be filed with the agency within twenty-five days after all rendition of the final decision.¹¹¹ Unless the agency acts on the motion within forty-five days of the final agency order, the motion for rehearing is overruled by operation of law.¹¹² Although the agency has some flexibility to ex-

155.06.00.001, 3 Tex. Reg. 529 (1978).

103. Tex. Air Control Bd., Rule 131.02.05.017, 1 Tex. Reg. 1171 (1976).

104. Tex. Water Comm'n, Rule 155.05.00.040, 3 Tex. Reg. 528 (1978).

105. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 16(d) (Vernon Supp. 1978).

106. Tex. Water Comm'n, Rule 155.05.00.045, 3 Tex. Reg. 528 (1978); Tex. Air Control Bd., Rule 131.02.05.022, 1 Tex. Reg. 1171 (1976).

107. TEX. REV. CIV. STAT. ANN. art. 6252-13a, §§ 16(a), (b) (Vernon Supp. 1978).

108. *Id.* § 16(b).

109. *Id.* § 16(b).

110. *Id.* §§ 16(c), (e).

111. *Id.* § 16(e).

112. *Id.* § 16(e).

tend these time periods for up to ninety days after rendition of the decision, extension of the period beyond ninety days requires agreement by all parties and approval of the agency involved.¹¹³

GUARANTEEING IMPARTIAL AGENCY DECISION

The right to receive an unbiased decision based upon the evidence adduced before the trier of fact is one of the most fundamental rights encompassed under the right to due process of law in both the Texas and United States Constitutions. By two important statutory enactments, the Texas Legislature has attempted to protect this right in agency proceedings. The first statutory enactment chronologically was the Texas Open Meetings Act¹¹⁴ which provides that "every regular, special, or called meeting or session of every governmental body shall be open to the public."¹¹⁵ While the Act does permit closed or executive meetings, it mandates that such meetings cannot be held unless the governmental body has first convened in an open meeting for which notice has been duly given.¹¹⁶ In order to properly close the meeting to the public, however, the presiding officer must publicly announce that a closed or executive session will be held and identify the section or sections of the Act which authorize the closed executive session.¹¹⁷

The only subjects which can be discussed in a closed or executive session of the environmental agencies are:

(1) Consultations between the agency and its attorney, provided that the agency in the executive session only seeks the attorney's advice with respect to (a) pending or contemplated litigation; (b) settlement offers; or (c) matters where the duty of the agency's attorney to his client, pursuant to the Code of Professional Responsibility of the State Bar of Texas, clearly conflicts with discussing the matter in public.¹¹⁸

(2) Discussions on "purchase, exchange, lease, or value of real property, negotiated contracts for prospective gifts or donations" to the agency; provided the public discussion of such issues would have a detrimental effect on a negotiating position of the agency as between that agency and a third person.¹¹⁹

113. *Id.* § 16(e), (f).

114. TEX. REV. CIV. STAT. ANN. art. 6252-17, §§ 1-4 (Vernon Supp. 1978).

115. *Id.* § 2(a).

116. *Id.* § 2(a).

117. *Id.* § 2(a).

118. *Id.* § 2(e). See TEX. ATT'Y GEN. OP. NO. M-1261 (1972).

119. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(f) (Vernon Supp. 1978).

(3) Cases involving “the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee or to hear complaints or charges against such officer or employee, unless such officer or employee requests a public hearing.”¹²⁰

(4) Discussions regarding the “deployment, or specific occasions for implementation, of security personnel or devices.”¹²¹

Whenever there has been a closed meeting the agency may not take any final action or vote with regard to any matter considered in the closed meeting.¹²² Therefore, to make a final decision on matters considered in the closed meeting, the Board must reconvene in a public meeting.

The Act also requires that the agency give written notice of the date, hour, place and subject matter of each meeting to be held.¹²³ Notice is achieved by delivering the required information to the Secretary of State far enough in advance of the meeting to allow access to the notice by the general public for at least seventy-two hours preceding the scheduled time of the meeting, or in the case of a state board or commission, seven days prior thereto.¹²⁴ The environmental agencies normally have notices of their regular meetings posted in the Texas Register, pursuant to the provisions of the Administrative Procedure-Texas Register Act.¹²⁵

Emergency meetings are permitted under the terms of the Act as are supplemental notices to the agenda previously posted with the Secretary of State.¹²⁶ In either case, notice can be in compliance with the Act if given at least two hours in advance of the meeting being convened.¹²⁷ The abbreviated notice, however, must contain an explanation of the emergency or urgent public necessity requiring such drastic action.¹²⁸ Failure to comply with the Act’s notice provisions may result in a subsequent judicial invalidation of any action taken

120. *Id.* § 2(g). *But see* TEX. ATT’Y GEN. OP. NO. H-496 (1975).

121. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(j) (Vernon Supp. 1978).

122. *Id.* § 2(1).

123. *Id.* § 3A(a). The Act further provides for the methods of adequate notice which must be given by city and county governments, school districts, and water districts. *Id.* § 3A(c)-(g).

124. *Id.* § 3A(a), (b), & (h).

125. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 6(a)(3) (Vernon Supp. 1978). It appears that compliance with the seven day requirement of the Open Meetings Act would place the notice in the Texas Register some three to six days prior to the actual meeting.

126. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 3A(h) (Vernon Supp. 1978).

127. *Id.* § 3A(h).

128. *Id.* § 3A(h).

in the meeting for which the notice was faulty.¹²⁹

The Act includes potentially severe misdemeanor penalties for willful violations of the Act's intent. It provides that any member of a governing body who either willfully calls or aids in calling or organizing a closed meeting, or willfully closes or aids in closing a regular public meeting, or who participates in a closed public meeting outside of the provisions of the Act, is guilty of a misdemeanor and on conviction can be punished by a fine of not less than \$100 nor more than \$500, or imprisonment in the county jail for not less than one month nor more than six months, or both.¹³⁰ There is a similar penalty for conspiring to circumvent the provisions of the Act by meeting in numbers of less than a quorum for the purpose of secret deliberations in contravention of the Act.¹³¹

The second statutory protection for impartial agency decisions is found in APTRA's provision which prohibits *ex parte* communications in a contested case unless all parties are given notice and an opportunity to participate.¹³² The prohibition on *ex parte* consultations applies to all members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case.¹³³ This prohibition will therefore normally apply to the hearing examiner or hearing panel and the individual members of the Board or Commission.

Because the hearing examiner works among the very people who constitute one of the parties to the hearing, the potential for abuse of this prohibition is obvious. In situations where an attorney is a hearing examiner, he will probably need assistance from the staff in understanding and evaluating much of the technical data presented to him. While it is still unclear whether such contact without prior notice and opportunity to be present is an "*ex parte* communication" under the Act, it is the author's opinion that the agency is a party to a "contested case," and that such contact is within the

129. *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 646 (Tex. 1975); *Toyah Independent School Dist. v. Pecos-Barstow Independent School Dist.*, 466 S.W.2d 377, 378 (Tex. Civ. App.—San Antonio 1971, no writ) (court indicated that notice provisions of Open Meetings Act were mandatory). See also *Burton v. Ferrill*, 531 S.W.2d 197, 200 (Tex. Civ. App.—Eastland 1975, writ dismissed); *Stelzer v. Huddleston*, 526 S.W.2d 710, 713 (Tex. Civ. App.—Tyler 1975, writ dismissed) (notice need only "substantially comply" with section 3A). But see TEX. ATT'Y GEN. OP. NO. H-373 (1974) ("substantial compliance" not in furtherance of legislative intent).

130. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 4(a) (Vernon Supp. 1978).

131. *Id.* § 4(b).

132. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 17 (Vernon Supp. 1978).

133. *Id.* § 17.

ambit of the "ex parte" prohibition. Although there have been no cases from the environmental agencies where violations of this prohibition have been proven, the opportunities for abuse are so pervasive that a public interest representative should carefully watch for possible violations.

JUDICIAL REVIEW OF AGENCY DECISIONS

The most important thing to remember regarding judicial review of agency action is to avoid placing one's self in the position of attempting to judicially overturn a final agency decision. The reasons to avoid this position are numerous but can be summarized in three ways. First, the courts generally prefer to uphold agency decisions, second, the plaintiff has an extremely difficult burden of proof, and third, even if the plaintiff prevails, he will usually achieve no better than a remand to the agency for a new hearing. If, however, the amount of litigation generated since the effective date of APTRA is any indication, many persons will ultimately find themselves in the unfortunate position of prosecuting an appeal from agency decisions.

Rulemaking

Both the Texas Clean Air Act and the Texas Water Code require that the appeal of an agency decision be brought within thirty days after rendition of a final decision.¹³⁴ Any challenge to a rule on the basis that it was not adopted in conformance with APTRA must be brought within the two year statute of limitations established by the Act.¹³⁵ All three acts contain jurisdictional venue provisions that confine the judicial review of agency decisions to the district courts of Travis County.¹³⁶ Consequently, the plaintiff will be in the Travis County courts and unless the challenge is based solely upon a procedural requirement found in APTRA, the petition must be filed

134. TEX. WATER CODE ANN. § 5.351(b) (Vernon Supp. 1978); TEX. REV. CIV. STAT. ANN. art. 4477-5, § 6.01(b) (Vernon 1976). The requirement of a final decision necessarily includes the exhaustion of administrative remedies prior to an appeal to the district court. The courts look closely at the action appealed from to determine if it fits under the statutory enumeration of appealable agency actions. See *Lloyd A. Fry Roofing Co. v. State*, 516 S.W.2d 430, 433 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.) (request for stack sampling not equal to "any ruling, order, decision, or other act of the [Air] Board").

135. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5(e) (Vernon Supp. 1978).

136. TEX. WATER CODE ANN. § 5.354 (Vernon Supp. 1978); TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 12 (Vernon Supp. 1978); TEX. REV. CIV. STAT. ANN. art. 4477-5, § 6.01(a) (Vernon 1976).

within thirty days of the adoption of the rule.

APTRA does have a provision which allows a person to circumvent the thirty day statute of limitations in the environmental acts.¹³⁷ This provision permits a plaintiff to request the district court of Travis County to determine the validity or applicability of any rule by way of declaratory judgment upon allegations that the rule, or its threatened application, would interfere with, impair, or threaten to impair the plaintiff's legal rights or privileges.¹³⁸ There is no requirement that such a declaratory judgment petition be filed within any time period after the agency promulgates the regulation.¹³⁹ Moreover, the declaratory judgment can be rendered "even though the plaintiff has not previously requested the agency to pass on the validity or the applicability of the rule in question."¹⁴⁰ There is a proviso, however, which prevents the use of a declaratory judgment proceeding to delay an administrative hearing in which the agency is considering the suspension, revocation, or cancellation of a license once adequate notice of that hearing has been given.¹⁴¹

The standard for judicial review of an agency's promulgation of a rule is whether there was substantial evidence in existence at the time the agency promulgated that rule to support the agency's determination, as shown from the evidence introduced in court.¹⁴² In other words, the record before the agency is irrelevant, the testimony heard by the agency is irrelevant, the reasons given by the agency for adopting the rule are irrelevant, and any findings made by the agency in connection with the adoption of the rule are irrelevant.¹⁴³ Only evidence concerning the Agency's basis for decision which is introduced in the district court will determine the ultimate validity or invalidity of the rule.¹⁴⁴

137. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 12 (Vernon Supp. 1978).

138. *Id.* § 12.

139. *See id.* § 12.

140. *Id.* § 12.

141. *Id.* § 12.

142. *See Lewis v. Metropolitan Sav. & Loan Ass'n.*, 550 S.W.2d 11, 16 (Tex. 1977); *Gerst v. Nixon*, 411 S.W.2d 350, 354 (Tex. 1966); *Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S.W.2d 424 (1946). *See also Reavley, Substantial Evidence and Insubstantial Review in Texas*, 23 Sw. L.J. 239 (1969).

143. These proceedings are irrelevant only as evidence of the agency's basis for decision in the district court, not as to all review on the question of substantial evidence.

144. Although the court hears completely new evidence it may only substitute its judgment for that of the agency if, from the evidence adduced at trial, the agency's decision was not supported by substantial evidence. *See Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S.W.2d 424 (1946). Texas' version of this rule has been called the "substantial evidence de novo rule" since it combines elements of each "pure" form of review. *See generally Reavley, Substantial*

Contested Cases

The Administrative Procedure-Texas Register Act (APTRA) fundamentally changed the judicial review of agency enforcement orders, permit decisions, and other non-rulemaking decisions.¹⁴⁵ Prior to the enactment of APTRA, judicial review of agency decisions not involving the promulgation of rules was equivalent to the current standard of review for rulemaking decisions.¹⁴⁶ Currently, however, section 19 of APTRA controls the method of review for all appeals from "contested cases."¹⁴⁷ Under section 19 the procedure on appeal of a contested agency decision is by one of two methods: de novo review under section 19(c) or review of the agency's judgment on the basis of the agency record.¹⁴⁸ However, APTRA does not attempt to substantively establish the scope of judicial review in a "contested case," leaving the scope of review to the agency's authorizing statute.¹⁴⁹ Although on its face the problem appears to be easily solved by an investigation of the pertinent statutory provisions, the curious legislative and judicial history of agency review in Texas prevents such cursory analysis.¹⁵⁰ The environmental statutes' particular provisions must therefore be examined closely in order to determine which contested cases will be reviewed by a section (c) de novo

Evidence and Insubstantial Review in Texas, 23 Sw. L.J. 239 (1969); Comment, *Judicial Review of Administrative Agency Action — A Need for Texas Reform?*, 40 TEXAS L. REV. 992 (1962).

145. See generally TEX. REV. CIV. STAT. ANN. art. 6252-13a, §§ 19, 20 (Vernon Supp. 1978); Hamilton & Jewett, *Administrative Procedure & Texas Register Act: Contested Cases & Judicial Review*, 54 TEXAS L. REV. 285, 303-11 (1976) (analysis of section 19).

146. See discussion of the substantial evidence rule text and notes 138 & 139 *supra*.

147. TEX. REV. CIV. STAT. ANN. art. 6252-13A, § 19(a) (Vernon Supp. 1978). "A person . . . who is aggrieved by a final decision in a contested case is entitled to judicial review under this act." *Id.* "Contested case" is defined in section 3(2) of APTRA as "a proceeding . . . in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for adjudicative hearing." *Id.* § 3(2); see Hamilton & Jewett, *The Administrative Procedure & Texas Register Act: Contested Cases & Judicial Review*, 54 TEXAS L. REV. 285, 286-92 (1976) (analysis of the ambiguities inherent in the definition of contested case).

148. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(c), (d), (e) (Vernon Supp. 1978).

149. See *id.* § 19(c), (d). Section (c) provides: "If the manner of review authorized by law for the decision complained of is by trial de novo, the reviewing court shall . . ." *Id.* § (c). Section (d) stipulates: "If the manner of review authorized by law for the decision complained of is other than by trial de novo: . . ." *Id.* § (d).

150. The Texas substantial evidence rule is a product of legislative and judicial interaction which altered the effect of statutory recitations calling for de novo review to mean a review of "the reasonableness of the support [for the agency's decision] afforded by substantial evidence [upon examination of] all the evidence. *Jones v. Marsh*, 148 Tex. 362, 369, 224 S.W.2d 198, 202 (1949); *Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S.W.2d 424 (1946). See generally Hamilton & Jewett, *The Administrative Procedure & Texas Register Act: Contested Cases & Judicial Review*, 54 TEXAS L. REV. 285, 294 n.29, 295-302 (1976).

review or section (d) on-the-record agency review.

The Department of Water Resources provides for judicial review of the Department's acts by allowing affected persons to "file a petition to review, set aside, modify, or suspend the act of the department."¹⁵¹ This provision clearly does not refer to either de novo or substantial evidence review, but the almost exact predecessor of this statute was interpreted to provide for review under the substantial evidence rule which allows new evidence to be introduced at trial.¹⁵² In light of this judicial construction, it appears that the appeal of contested cases from the Department of Water Resources will fall under section 19(d) and 19(e). Such review will therefore be on the basis of the agency record and limited to a consideration of whether the appellant's substantial rights have been prejudiced by one of the six categories of agency error justifying reversal or remand of agency decisions.¹⁵³

The Texas Air Control Board and its authorizing statute, the Texas Clean Air Act, provide for two standards of review to control appeals from an Air Board action.¹⁵⁴ The first method employs commonly used language specifying that "[i]n an appeal of board action . . . the issue is whether the action is invalid, arbitrary, or unreasonable."¹⁵⁵ This language can be assumed to have been used to indicate review under the traditional Texas substantial evidence rule because it follows the judicial language of substantial evidence review set out by the major decisions in this state.¹⁵⁶ Since the legis-

151. TEX. WATER CODE ANN. § 5.351 (a) (Vernon 1977).

152. See *Webster v. Texas Water Rights Comm'n*, 518 S.W.2d 607, 610 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

153. TEX. REV. CIV. STAT. ANN. art. 6252-13(a), § 19(d), (e)(1)-(6) (Vernon Supp. 1978). The statute provides that:

[T]he court may not substitute its judgment for that of the agency as to the weight of the evidence on questions committed to agency discretion but may affirm the decision of the agency in whole or in part and shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) not reasonably supported by substantial evidence in view of the reliable and probative evidence in the record as a whole; or
- (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. § 19 (e)(1)-(6).

154. TEX. REV. CIV. STAT. ANN. art 4477-5, § 6.01 (e), (f) (Vernon 1976).

155. *Id.* § 6.01 (e).

156. See, e.g., *Gerst v. Nixon*, 411 S.W.2d 350, 354 (Tex. 1966) (judicial question whether

lature is presumed to have knowledge of court decisions and legal doctrines which exist when they enact or amend a statute,¹⁵⁷ it can be validly assumed that the method of review intended was the substantial evidence test as defined by court decisions and the wording of APTRA's section 19(e).¹⁵⁸ If one accepts this analysis, then presumably all appeals from the Air Board, other than cancellation or suspension of a variance, would be under the procedure set out in APTRA's section 19(d) and under the scope of review provided in the second half of section 19(e) "where the law authorizes review under the substantial evidence rule, or where the law does not define the scope of judicial review" ¹⁵⁹

The Clean Air Act makes special provision for review of the cancellation or suspension of a variance.¹⁶⁰ Section 6.01(f) provides that such appeals shall be tried "in the same manner as appeals from the justice court to the county court."¹⁶¹ This particular language was utilized by the legislature to force de novo review for agency decisions after the Supreme Court and the lower courts construed it as requiring true de novo review.¹⁶² Again presuming the legislature had knowledge of these judicial constructions at the time of enactment, it seems apparent that appeals from cancellation or suspension of variances are to be controlled by section 19(c)'s "de novo manner of review" and section 19(e)'s "de novo scope of review"

Another environmental statute which has similar provisions for

the decision is fraudulent, capricious, or arbitrary as determined by substantial evidence); *Gerst v. Cain*, 388 S.W.2d 168, 171 (Tex. 1965) ("findings could not be arbitrary or capricious, but must have support in substantial evidence"); *Chemical Bank & Trust Co. v. Falkner*, 369 S.W.2d 427, 433 (Tex. 1963) ("[is there] substantial evidence to support the Board order so that it is not illegal, arbitrary or unreasonable").

157. See *Texas Air Control Bd. v. Travis County*, 502 S.W.2d 213, 217 (Tex. Civ. App.—Austin 1973, no writ); *Humble Pipeline Co. v. State*, 2 S.W.2d 1018, 1019 (Tex. Civ. App.—Austin 1928, writ ref'd).

158. See note 148 *supra* for text of TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19 (e)(6) (Vernon Supp. 1978).

159. *Id.* § 19(e).

160. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 6.01 (f) (Vernon 1976).

161. *Id.* § 6.01 (f). This manner of appeal has traditionally been by actual "trial de novo" as provided by the Texas Rules of Civil Procedure. TEX. R. CIV. P. 591.

162. *Key Western Life Ins. Co. v. State Bd. of Ins.*, 350 S.W.2d 839, 846 (Tex. 1961); *Cortez v. State Bd. of Morticians*, 306 S.W.2d 243, 244 (Tex. Civ. App.—San Antonio), writ *dism'd w.o.j. per curiam*, 308 S.W.2d 12 (Tex. 1957); *Rockett v. Texas State Bd. of Medical Examiners*, 287 S.W.2d 190, 191 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.). See generally Comment, *Judicial Review of Administrative Agency Action—A Need for Texas Reform?*, 40 TEXAS L. REV. 992, 996-1004 (1962). It should not be forgotten that these courts were also analyzing the constitutionality of these statutes on the question of separation of powers. See *id.* at 999, 1003.

appeal is the Solid Waste Disposal Act.¹⁶³ This statute follows the Clean Air Act's section 6.01(e) and provides that an appeal from an action of the Department of Health Resources, Department of Water Resources, or any lesser governmental entity entitled to exercise authority under the act is to be reviewed as to "whether the action is invalid, arbitrary or unreasonable."¹⁶⁴ Following the analysis for the same provision of the Clean Air Act,¹⁶⁵ it seems certain that appeals from "any ruling, order, decision, or other act" of one of the authorized governmental agencies will be under the substantial evidence/on-the-record review of section 19(d) and (e).¹⁶⁶

Should the questions of manner and scope of review arise in other statutes, the author believes the above method of analysis will operate to determine which provisions of APTRA's section 19 apply. The many variations in review statutes may require additional historical research into the judicial construction of similar provisions for appeal.¹⁶⁷

In substantial evidence review, the only evidence which may be introduced before the court outside of the agency record is evidence of procedural irregularities such as *ex parte* communications or major evidentiary mistakes.¹⁶⁸ If a party to the appeal believes that additional evidence should be included in the record, he may petition the court to have the case remanded to the agency in order to hear additional evidence on the issue, provided he can show good cause why the evidence was not introduced at the time of the agency's original hearings on these matters.¹⁶⁹ The degree to which the parties in a judicial appeal are bound to the record as it was made before the agency clearly illustrates why active and thorough participation in the agency proceedings is important.

The procedure for review of "contested case" decisions as it has been developed by the judges of the Travis County District Courts is essentially as follows:

- (1) After the plaintiff has filed his petition, the agency is re-

163. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 9 (Vernon Supp. 1978).

164. *Id.* § 9.

165. See discussion in text and notes 149-154 *supra*.

166. TEX. REV. CIV. STAT. ANN. art. 6252-13(a), § 19 (d), (e) (Vernon Supp. 1978).

167. Good background material for such research can be found in: McCalla, *The Administrative Procedure & Texas Register Act*, 28 BAYLOR L. REV. 445 (1976); Hamilton & Jewett, *The Administrative Procedure & Texas Register Act: Contested Cases & Judicial Review*, 54 TEXAS L. REV. 285 (1976); Comment, *Judicial Review of Administrative Agency Action—A Need for Texas Reform?*, 40 TEXAS L. REV. 992 (1962).

168. *Id.* § 19(d)(2).

169. *Id.* § 19(d)(2).

quired by APTRA to file the agency record with the court.¹⁷⁰ The agency record may be shortened by stipulation of the parties.¹⁷¹ If a party unreasonably refuses to stipulate to a shortened record, the additional cost for filing the entire record can be assessed against the party refusing to stipulate.¹⁷²

(2) After the agency record is filed with the court, the parties can present to the court an agreed briefing schedule in the case, or in the alternative, request a court hearing to have the court establish a briefing schedule. At any such hearing, motions to remand to the agency for additional evidence, to include additional documents in the agency record, or to establish pretrial discovery on procedural irregularities outside the record can be brought to the court's attention for disposition.

(3) After the briefs have been filed, either party can request the court to set a trial date for the cause. Provided there is no evidence to be adduced on the question of procedural irregularities, the case is submitted to the court on the basis of briefs and oral argument presented at the time of trial.

It should also be noted that both the Texas Water Code and the Texas Clean Air Act have provisions requiring the court to dismiss any appeal filed against an agency after a period of one year if the case has not been diligently pursued.¹⁷³

Judicial Decisions

APTRA made so many profound changes in the judicial review of agency decisions that a discussion of case law prior to 1976 is basically only of historical importance, except for appeals of general applicability rules. While few appellate decisions have thus far been rendered interpreting the various provisions of APTRA, the decisions which have been handed down clearly indicate that the courts are restrictively interpreting the Act.¹⁷⁴ It should also be noted that there have been no appellate decisions on rules or regulations adopted pursuant to APTRA, instead all the litigation and resulting case law has been based on the contested case provisions

170. *See id.* § 19(d)(1).

171. *See id.* § 19(d)(1).

172. *See id.* § 19(d)(1).

173. TEX. WATER CODE ANN. § 5.353 (Vernon Supp. 1978); TEX. REV. CIV. STAT. ANN. art. 4477-5, § 6.01(d) (Vernon 1976).

174. *See, e.g.,* *Hardin v. Texas Bd. of Pardons & Paroles*, 554 S.W.2d 18, 19-20 (Tex. Civ. App.—Austin 1977, no writ); *Robinson v. Bullock*, 553 S.W.2d 196, 197-98 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.). Both of the above cases refused to adopt the appellant's arguments for an expansive reading of APTRA's section 19.

of the Administrative Procedure Act.¹⁷⁵

Recently, in *Imperial American Resources Fund, Inc. v. Railroad Commission of Texas*,¹⁷⁶ the Texas Supreme Court gave effect to the Administrative Procedure Act's clearly expressed intention that judicial review of contested cases is to be based on the record made before the administrative agency.¹⁷⁷ The court pointed out that prior to January 1, 1976, judicial review was by trial in the district court upon a newly developed record of evidence, without reference to the evidence heard by the Commission at the prior hearing.¹⁷⁸ Instead the order was tested by the substantiality of the evidence adduced only in the trial court.¹⁷⁹ The court then held that while an agency's administrative orders are still considered prima facie valid and subject to review under the substantial evidence rule, APTRA confined the judicial review to the record made before the administrative agency.¹⁸⁰ The result of this change is that the agencies and reviewing courts now consider the same evidence. As Justice Daniel pointed out:

Judicial review under the essential standards of the substantial evidence rule has been preserved, but the courts now test the substantiality of the evidence upon which an administrative agency made its decision. This furnishes more assurance of administrative due process and a surer means of determining whether an agency acted arbitrarily, capriciously, and without due regard to the evidence.¹⁸¹

The importance of the *Imperial* decision lies primarily in the court's support for an interpretation of APTRA which makes agency proceedings similar to trial court proceedings and provides for agency decisions to be reviewed in basically the same manner as

175. However, a case currently pending before the Third Supreme Judicial District Court in Austin involves the appeal of a rule promulgated by the Texas Parks & Wildlife Commission. See *Stockton v. Texas Parks & Wildlife Comm'n*, No. 12,756 (Dist. Ct. of Travis County, 3d Judicial Dist. of Texas). Points of error on the method of review, the scope of review, and the procedural provisions of section 5 of APTRA have all been raised by appellants.

176. 557 S.W.2d 280 (Tex. 1977).

177. *Id.* at 284.

178. *Id.* at 284.

179. *Id.* at 284; see *Hawkins v. Texas Co.*, 146 Tex. 511, 209 S.W.2d 338 (1948); *Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S.W.2d 424 (1946).

180. *Imperial Am. Resources Fund, Inc. v. Railroad Comm'n.*, 557 S.W.2d 280, 284 (Tex. 1977). The Act expressly provides for an exception that procedural irregularities not reflected in the record may be considered by the court. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(d)(3) (Vernon Supp. 1978).

181. *Imperial Am. Resources Fund, Inc. v. Railroad Comm'n.*, 557 S.W.2d 280, 285 (Tex. 1977).

trial court decisions.¹⁸² First, the court considered Imperial's contention that the Railroad Commission findings did not conform to the requirements of section 16(b) of the Administrative Procedure Act.¹⁸³ Although the court rejected this contention, it indicated that it was evaluating the findings of fact using the same criteria as would be used in evaluating the findings of a jury or a trial judge.¹⁸⁴

While some of the findings might be more artfully worded, they are substantially as would be expected from a trial judge or a jury in answer to controlling rather than incidental fact issues. We believe they meet the statutory requirement for separate findings of fact and that they are sufficient to support the Commission's conclusions and order.¹⁸⁵

Second, the court broached the question of when error should result in a remand to the agency. Under the Administrative Procedure Act, judicial notice may be made of all facts judicially cognizable and notice may be taken of generally recognized facts within the area of the agency's specialized knowledge.¹⁸⁶ The parties are to be notified, however, either before or during the hearing as to the evidentiary material of which the agency takes official notice.¹⁸⁷ They are then afforded an opportunity to contest the matter so noticed.¹⁸⁸ While the court agreed with Imperial that this failure to give notice was error, it ultimately held that such error was harmless error and did not necessitate a remand to the agency since no harm or prejudice to Imperial had been proved.¹⁸⁹ By this holding, the court clearly indicated to the trial courts that the harmless error rule, as applied by the courts of civil appeals to trial court decisions, is appropriate in the review of agency hearings as well.¹⁹⁰

182. *Id.* at 284-85.

183. *Id.* at 283.

184. *Id.* at 286.

185. *Id.* at 286.

186. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 14(q) (Vernon Supp. 1978).

187. *Id.* § 14(q).

188. *Id.* § 14(q); see *Imperial Am. Resources Fund, Inc. v. Railroad Comm'n*, 557 S.W.2d 280, 288 (1977).

189. *Imperial Am. Resources Fund, Inc. v. Railroad Comm'n*, 557 S.W.2d 280, 288 (Tex. 1977). The court stated that "[t]he burden of showing harm or prejudice on account of failure to give notice of consideration of irrelevant records was upon Imperial. Having failed to make such showing, the error is treated as harmless and not sufficient grounds for reversal." *Id.* at 289.

190. See *id.* at 289. See also *Lampasas Fed. Sav. & Loan Ass'n v. Lewis*, 559 S.W.2d 913 (Tex. Civ. App.—Waco 1977, no writ) wherein the court found Appellant had failed to show harm in the Commissioner's rendering his decision sixty-eight days after the close of the hearing rather than the 60 days required by section 16(d) of APTRA.

Several other decisions have indicated the courts are determined to make administrative proceedings the approximate equivalent of district court trials. In *Texas State Board of Pharmacy v. Kittman*,¹⁹¹ a motion for rehearing was held to be a requisite element in the exhaustion of administrative remedies necessary to obtain judicial review.¹⁹² Despite the fact that the statute establishing the Board of Pharmacy did not require a motion for rehearing, the court held that the more recent provisions of APTRA control as to the proper procedure for appeal and review of agency decisions.¹⁹³ In *Lewis v. Metropolitan Savings and Loan Association*,¹⁹⁴ the Texas Supreme Court held that evidence improperly excluded by the hearing examiner, and therefore, not available to the agency in making its decision, denied the plaintiff due process of law.¹⁹⁵ The prior rule in Texas had been that errors by administrative agencies could never deny due process because of the opportunity for judicial review of the matter.¹⁹⁶ This was premised, however, upon the evidence being presented anew in the court proceeding.¹⁹⁷ Now that the review is based on the record, the evidentiary decisions of hearing examiners and commissions will apparently be reviewed in the same manner as a district court decision.

One other decision deserves mention. In a letter opinion by District Judge Hume Cofer in the case of *Southwest Livestock & Trucking Co. v. Texas Air Control Board*,¹⁹⁸ Judge Cofer held that Southwest Livestock could not raise matters in a judicial appeal which had not been previously raised in its motion for rehearing.¹⁹⁹ Additionally, Judge Cofer held that the Plaintiff waived its right to complain of the Board's inadequate findings because it failed to propose its own findings on these issues or to except to the absence of such findings in the proposal for decision.²⁰⁰ If this decision stands, it will be a further indication of a judicial trend to equate agency hearings

191. 550 S.W.2d 104 (Tex. Civ. App.—Tyler 1977, no writ).

192. *Id.* at 106.

193. *Id.* at 106-07.

194. 550 S.W.2d 11 (Tex. 1977).

195. *Id.* at 14.

196. *Jordan v. State Bd. of Ins.*, 160 Tex. 506, 513, 334 S.W.2d 278, 283 (1960).

197. See *Hawkins v. Texas Co.*, 146 Tex. 511, 514, 209 S.W.2d 338, 340 (1948); *Trapp v. Shell Oil Co.*, 145 Tex. 323, 349, 198 S.W.2d 424, 440 (1946).

198. *Southwest Livestock & Trucking Co. v. Texas Air Control Bd.*, No. 257,739 (Dist. Ct. of Travis County, 53d Judicial Dist. of Texas, March 21, 1978).

199. *Id.*

200. *Id.*

with trial court decisions by making a motion for rehearing equivalent to a motion for new trial.²⁰¹

CONCLUSION

While this article has focused on practice before the Texas Air Control Board, Texas Water Development Board, and Texas Water Commission, there are many other state agencies with substantial environmental functions.²⁰² All the statutory provisions of APTRA discussed in this article are clearly applicable to those agencies. By discussing the procedural rules of the air and water agencies and relating the general procedural statutes to the specific enabling statutes of the air and water agencies, the article should indicate to the public interest representative two things. First, that the procedural rules of one agency do deviate significantly from those of another agency; and, second, that the requirements of an agency's enabling or substantive statutes impose different or additional procedural requirements on an agency over and above the general procedural requirements.

After reading this article, one fact should be abundantly clear. Within the last five years there has been an explosion of laws and regulations designed solely to promote participatory democracy and to ensure that state agencies fairly and impartially decide the issues before them. The impact of this new access to agency rulemaking and adjudication remains to be tested by those individuals and legal practitioners who seek to inject their input into the major environmental decisions occurring within this state's many environmentally related agencies.

201. Notice however that the recently amended Rules of Civil Procedure no longer require a motion for new trial as a prerequisite to appeal. See Tex. R. Civ. P. 324.

202. *E.g.*, Texas Parks and Wildlife Department, Texas Health Department, Texas Railroad Commission, and the Texas Department of Agriculture all have significant authority over environmental concerns within their particular areas.